

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 474

PASQUALE A. NATARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 1, 1968, and, on September 3, 1968, the petition was filed.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] September 1 and 2 were a Sunday and a legal holiday respectively.

321-444—68

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the proof and the indictment.

2. Whether an intent to affect commerce is a necessary element of a conspiracy to obstruct commerce by robbery.

3. Whether a conspiracy to transport stolen goods in interstate commerce can be formed prior to the theft of the goods.

4. Whether the district court erred in determining for itself, after an *in camera* inspection, that records of an electronic surveillance were irrelevant to the prosecution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner and four other individuals[2] were convicted of conspiracy to obstruct commerce through the robbery of Armored Transport, Inc. of Los Angeles, California, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner and the same individual defendants were also convicted under a separate count of conspiracy to transport in interstate commerce goods of the value of $5,000 or more knowing them to be stolen, in violation of 18 U.S.C. 2314. This second conspiracy embraced both a plan to rob Mrs. Carole McCune of jewelry and a plan to rob Armored Transport, Inc. On December 11, 1967, petitioner was sentenced to imprisonment for twenty years on the first count and five

[2] Charles Caci, Stephen Cino, Frederico Randaccio and Louis Sorgi were also convicted.

years on the second count, the sentences to run concurrently.

The government's evidence, recounted in detail by the court below (Pet. 2–7), may be summarized briefly. On December 29, 1964, Pascal Calabrese robbed the City Hall in Buffalo, New York, and then went into hiding (R. 377, 385). Defendant Stephen Cino subsequently arranged for Calabrese to meet petitioner and defendant Frederico Randaccio to discuss participation in prospective robberies in California (R. 186–187, 190–191). On the evening of February 5, 1965, the meeting took place at petitioner's house in Buffalo. Plans for two robberies in Los Angeles were discussed: first the robbery of Mrs. Carole McCune at the Beverly Hilton Hotel of $400,000 in jewelry and thereafter the robbery of an armored truck messenger who picked up the daily receipts at the hotel (R. 191–198). It was agreed that Cino would "fence" the jewelry before returning with the proceeds to Buffalo. Thereafter, petitioner and Randaccio gave Calabrese money to cover his expenses (R. 199–200). On February 7, 1965, Calabrese went to Los Angeles where he was met by defendant Charles Caci (R. 201–203). On February 10, 1965, Caci and Cino went to the home of Louis Sorgi, the person in charge of security at the Beverly Hilton Hotel, and planned the robberies with him (R. 207–208, 212–220). The following day, Calabrese and Sorgi visited the hotel suite which they expected Mrs. McCune, the owner of the jewelry, to occupy. They also studied the tunnel used by the armored

car messenger (R. 223–231). Calabrese then studied his escape route with Caci and Cino (R. 233–235). Both Sorgi and Caci had master keys for the hotel (R. 235).

When Mrs. McCune did not arrive at the hotel as expected, Sorgi telephoned her and discovered that she was ill (R. 241–243, 1099–1100). On February 17 Cino was called back to Buffalo after Calabrese's connection with the City Hall robbery became known (R. 250, 254–255). Calabrese left Los Angeles on the following day, and shortly thereafter surrendered himself to the authorities in Buffalo (R. 261–263).

ARGUMENT

1. Count one of the indictment charged that in February 1965 the defendants conspired to "obstruct, delay and affect commerce and the movement of money in commerce, by robbery, that is the unlawful taking * * * of money and property belonging to and in the care, custody * * * and possession of Armored Transport of Los Angeles, Inc." Petitioner argues that there is a prejudicial variance between the proof and the indictment, in that the evidence showing that a successful robbery of the armored car messenger would have interfered with the movement of out-of-town bank checks and traveler's checks in commerce does not fit within the allegations charging conspiracy to obstruct the movement of money in commerce (Pet. 15–17). Obviously, however, an interference with the interstate movement of checks would affect the movement of money. This contention

was, therefore, properly rejected as "frivolous" by the court below (Pet. 7).

2. Petitioner also contends that, since the robbery was not consummated, the court erred in instructing the jury as to count one that it was not necessary that the defendants intended that the carrying out of the conspiracy would have affected commerce. The purpose of 18 U.S.C. 1951, however, is to proscribe a category of criminal conduct which has a deleterious effect on commerce irrespective of the intent in that regard of the perpetrators of the crime. The statutory requirement is satisfied if, as here, the conspiracy's success would have affected commerce. *Nick* v. *United States,* 122 F. 2d 660, 673 (C.A. 8), certiorari denied, 314 U.S. 687; *United States* v. *Varlack,* 225 F. 2d 665, 672 (C.A. 2); *United States* v. *Pranno,* 385 F. 2d 387, 389–390 (C.A. 7), certiorari denied, 390 U.S. 944. As this Court stated in *Stirone* v. *United States,* 361 U.S. 212, 215, the Hobbs Act manifested "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."

3. Equally without substance is petitioner's challenge to count 2 of the indictment on the ground that a conspiracy to transport stolen goods and money in interstate commerce cannot exist prior to the theft of the goods and money. The partial execution of a substantive offense has never been considered to be a prerequisite to a conspiracy charge. Such a limitation would seriously impair the legislative policy

underlying the prohibition of criminal conspiracies, since "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." *Callanan* v. *United States*, 364 U.S. 587, 594.

4. Prior to trial, the government advised the defense that petitioner and defendant Randaccio had been on premises subject to an electronic surveillance and were participants in conversations that were overheard during the period of time covered by the instant indictment and two other indictments then pending in the district court (Pet. 21–22; R. 2811(6)). By affidavit, the government denied that it had obtained any evidence or leads to any evidence from the surveillance (Pet. 21–25; R. 2629–2630). Upon the basis of this representation, the district court, over defense objection, ordered a post-trial hearing on the issue of taint (Pet. 26–27; R. 2643–2644). Thereafter, the defense petitioned the court of appeals for a writ of mandamus directing that such a hearing be held prior to trial (Pet. 27–28). On October 4, 1967, this request was denied by the court of appeals, which noted in its *per curiam* opinion that the government had agreed to make available the logs of the electronic surveillance during any relevant period (Pet. 29). On October 6, 1967, at a pre-trial conference in the district court in which petitioner's counsel participated, counsel for defendant Randaccio indicated that such a relevant period would be a six-month period, extending either from three months before the period covered by the indictment to two months thereafter, or from two months before to three months after the indict-

ment period (October 6, 1967, Tr. 24–25, 8–9).[3] The district court then examined the logs of the electronic surveillance covering three months prior to the indictment period, the indictment period, and thereafter to the cessation of the surveillance. It also examined the entire government file (R. 2813–2815). It turned over to petitioner and defendant Randaccio the surveillance logs of February 1965, the indictment period (R. 1568–1570).[4] At a post-trial proceeding, the court, finding the additional logs "totally irrelevant and immaterial" to the instant prosecution, declined to turn them over.[5] It pointed out that third parties could be affected by the disclosure (R. 2813–2815). It also concluded, following a further hearing, that the government's case was developed from wholly independent sources (R. 2931(94)–2931(96)).

Although petitioner raised no issue based on this electronic surveillance in his direct appeal in the court of appeals, he argues, relying on *Alderman* v. *United States,* No. 133, October Term, 1967 (motion to amend the order of remand set down for reargument), that he should have been given all of the material that the government had in its possession concerning this surveillance. However, the district court has already conducted an *in camera* inspection

[3] We are lodging the transcript of this conference with the Clerk of the Court.

[4] A stipulation as to the content of part of these logs was introduced into evidence as part of defendant Randaccio's defense (R. 1997).

[5] At the post-trial proceeding, counsel for defendant Randaccio also requested that all additional logs, rather than merely those for the previously requested six-month period, be turned over to him (R. 2811(24)).

of the logs covering the period of time which petitioner initially thought might be relevant. Indeed, after the trial, that court reaffirmed its ruling in regard to inspection, at a time when the trial judge was familiar with all the evidence used at the trial. The district court found that the logs now requested did not contain any material relevant to the prosecution. If petitioner was not satisfied with this procedure, he should have challenged it in the court of appeals. In the absence of "exceptional circumstances," this Court has consistently refused to consider an issue not raised in the court below. See, *e.g., Lawn* v. *United States,* 355 U.S. 339, 362, n. 16. We suggest that where, as here, the disclosure of the electronic surveillance was made prior to the trial, such circumstances are not present.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JEROME M. FEIT,
SIDNEY M. GLAZER,
Attorneys.

OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968